

2015

**State of Utah, Plaintiff/Petitioner, v. Manuel Antonio Lujan,
Defendant/Respondent**

Utah Supreme Court

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Case No. 20150840-SC

IN THE
UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Petitioner,

v.

MANUEL ANTONIO LUJAN,
Defendant/Respondent.

Reply Brief of Petitioner

On Writ of Certiorari to the Utah Court of Appeals

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Reply Brief of Petitioner

Pursuant to rule 24(c), Utah Rules of Appellate Procedure, the State submits this brief in reply to new matters raised in the respondent's brief. The State does not concede any matters not addressed in the reply, but believes those matters are adequately addressed in the State's opening brief.

ARGUMENT

I.

**THIS COURT SHOULD CLARIFY THE STATE
CONSTITUTIONAL TEST ANNOUNCED IN *RAMIREZ***

Lujan argues that this Court should not "rearrange" the state constitutional analysis because the issue has not been preserved for this Court's review. Resp.Br. 22-31. Not only was the issue not timely raised, he argues, but there is no reason to address the existence of a threshold inquiry so long as the State agrees that suggestive state action occurred in this case

and both parties argue the reliability factors outlined in *State v. Ramirez*, 817 P.2d 774 (Utah 1991). *Id.* at 22-23.

Lujan's preservation argument is a non-starter. A grant of certiorari review permits this Court to review "the questions set forth in the petition or fairly included therein" and for which certiorari is granted. Utah R. App. P. 49(a)(4). *See also State v. Maguire*, 957 P.2d 598, 600 (Utah 1998) (limiting certiorari review to the issue granted by this Court and rejecting an issue that was not fairly included in the cert petition); *DeBry v. Noble*, 889 P.2d 428 (Utah 1995) (addressing on certiorari review issue subsidiary to question before Court). It may also consider matters fairly included within a petition which the court of appeals recommends for review. *See Utah R. App. P. 49(b).*

The court of appeals was faced with a state constitutional challenge to the admission of eyewitness identification testimony. Both the majority and the dissent applied the relevant *Ramirez* analysis but reached different results. *See State v. Lujan*, 2015 UT App. 199. In issuing the opinion, the entire panel recommended that this Court reconsider *Ramirez*, citing concerns about the "flaws inherent in the *Ramirez* analysis" and about continuing post-*Ramirez* research in the area. *Id.* at ¶1,n.1; *id.* at ¶21 (Pearce, J., dissenting). The *Ramirez* analysis cannot receive meaningful review by

this Court without an articulation of that analysis. And the parties disagree on that interpretation. In light of the court of appeals' concerns, the State's petition for certiorari review included a more complete articulation of its own interpretation of the *Ramirez* analysis. Pet. 9-12.

The court of appeals' erroneous application of the *Ramirez* analysis without the threshold state action step and the panel's unanimous plea for review of the analysis constitute the sort of "special and important reasons" justifying this Court's grant of certiorari review. Utah R. App. P. 46(a)(2). This Court's order granting review was in terms sufficiently broad to encompass the articulation of the *Ramirez* analysis. Whether the court of appeals erroneously applied the *Ramirez* test requires an articulation of the test. Consequently, the state constitutional test announced in *Ramirez* is fairly included in the scope of certiorari review and is properly before this Court.

Further, the State seeks to clarify, not overrule or replace, the *Ramirez* analysis, as Lujan avers.¹ Resp.Br. 28-29. The proper interpretation of *Ramirez* provides a distinct and workable state constitutional due process

¹The State opposed the replacement analysis advanced by the Amicus, moving to strike the amicus brief for failing to support either parties' position in this appeal. See Motion to Strike Brief of Amicus Curiae and Stay Briefing Schedule, filed Sept. 14, 2016.

analysis for the admissibility of eyewitness identification testimony. But the lack of clarity in that analysis has generated much confusion over the years, and this Court's continued silence on the matter simply fosters that confusion. See *State v. Clopten*, 2015 UT 82, ¶72 (putting off the issue simply "sow[s] the seeds of confusion" in the lower courts) (Lee, A.C.J., concurring in part and concurring in the judgment). While this case has been pending in this Court, the *Ramirez* analysis has been raised in the court of appeals in at least seven cases, one of which resulted in a decision that "the Utah Constitution does not require police misconduct—improper suggestiveness—as a threshold requirement in eyewitness identification cases."² *State v. Gallegos*, 2016 UT App 172, ¶40. The *Lujan* opinion epitomizes the prevailing confusion in the lower courts, and the court of appeals has articulated its continuing frustration with the matter. The time has come to clarify the test and permit courts and counsel to effectively analyze this type of evidence under the state constitution without the uncertainty and unpredictability that have arisen since *Ramirez*. This case

²Those cases include: *State v. Gallegos*, 2016 UT App 172, ¶40; *State v. Aponte*, Case No. 20150154-CA; *State v. Craft*, Case No. 20150750-CA; *State v. Beazer*, Case No. 20160029-CA; *State v. Gallegos*, 20150688-CA; *State v. Wright*, Case No. 20100655-CA; and *State v. Hull*, Case No. 20151028-CA.

presents a timely and appropriate opportunity for this Court to resolve the confusion.

Finally, clarification is necessary to ensure proper application of the test to the facts of any given case, including this one. Because a constitutional due process violation occurs only upon a finding of suggestive state action which prompts additional judicial scrutiny of the evidence, proper application of the first step of the test is imperative to a proper determination of constitutional admissibility.

Having granted certiorari review, this Court should clarify the state constitutional test introduced in *Ramirez*.

II

THE COURT OF APPEALS ERRONEOUSLY HELD ONEY'S IDENTIFICATION OF LUJAN TO BE CONSTITUTIONALLY UNRELIABLE³

A. The state constitutional analysis is a two-part test.

Absent a state action requirement, the *Ramirez* analysis raises an evidentiary question concerning the reliability of evidence to the level of a constitutional violation without justification. *See, e.g., Clopten*, 2015 UT 82, ¶76 (Lee, A.C.J., concurring in part and concurring in the judgment) (refusing to construe state due process clause in manner different than its federal counterpart absent an articulated basis for such interpretation); *see*

³This point responds to Lujan's Point I, Resp.Br. 9-21.

also *State v. Lawson*, 291 P.3d 673, 688-89 (Or. 2012) (treating reliability of eyewitness identification testimony as state evidentiary matter that did not require suggestive state action needed for due process inquiry).

Lujan offers no basis for reading the state due process clause in any but the traditional sense—requiring suggestive police activity. The silence in *Ramirez* suggests that the Court did not intend to do away with the need for state action. Instead, *Ramirez* started with the federal test—which included the threshold requirement of police misconduct—and did not expressly reject it as it strove to distinguish the state constitutional test. The parties agree that “*Ramirez* made a conscious departure from the federal model.” Resp.Br. 25. But that departure was not to abandon the first step of the federal model, as Lujan argues. *Id.* at 25-26. Instead, this Court stated that it established an “analytical model” for “determining the admissibility of arguably suggestive eyewitness identifications.” *Ramirez*, 817 P.2d at 779. Then it explained that it would not be limited “to an analytical model that merely copies the federal” model but would “require an in-depth appraisal of the identification’s reliability along the lines laid out by *Long*.” *Id.* at 780. Finally, it noted that its “approach departs from federal case law *only to the degree* that we find the federal analytical model scientifically unsupported.” *Id.* (emphasis added). This plain language only alters the reliability factors

to require a more thorough, “in-depth appraisal” under the second step of the analysis. *See id.* Had it intended to extend state constitutional due process concerns to instances independent of state conduct, it could have done so explicitly.

The State does not contest the potential unreliability of eyewitness identification testimony generally. But, absent police misconduct, the reliability of the evidence is a jury determination, and state constitutional and evidentiary safeguards effectively protect a defendant’s right to a fair trial without invading the jury’s province. Pet.Br. 19, 24; *State v. Clopten*, 2009 UT 84, ¶49 [*Clopten I*]; *see also Perry v. New Hampshire*, 132 S. Ct. 716, 729 (2012). Lujan presents no argument persuasively demonstrating otherwise.

Finally, *Ramirez’s* use of suggestiveness as one of the factors by which reliability is determined does not “plainly” eliminate it as a threshold inquiry. Resp.Br. 26. Upon a threshold finding of suggestive state action, the trial court is required to assess “whether under the ‘totality of the circumstances’ the identification was [sufficiently] reliable even though the confrontation procedure [employed by police] was suggestive.” *Neil v. Biggers*, 409 U.S. 188, 199 (1972). To accomplish this, the trial court must necessarily include the details of the suggestive conduct in its evaluation of

the totality of the circumstances. Nothing in *Ramirez* states otherwise, and the holding in *Ramirez* showed that suggestive state action does not necessarily require exclusion of eyewitness testimony, depending on that evaluation.

B. Oney's identification testimony was based on his personal knowledge, not the suggestiveness of the showup, and was admissible under the proper test.

As argued in the State's opening brief, the arrest-site identification procedure used by police in this case was arguably suggestive (warranting its consideration under the totality of circumstances) but was less suggestive than the showup in *Ramirez*.⁴ The procedural factors parallel *Ramirez*, but the witness factors show Oney's identification was the product of his own memory, not suggestion. Lujan's efforts to magnify the suggestibility of the showup fail to account for the facts at hand.

1. Circumstances favoring identification reliability.

Lujan contends that the showup was particularly suggestive because Oney's "original memory" was of a highly stressful event: a "high-stress

⁴A "showup can be as reliable as a lineup." *Lawson*, 291 P.3d at 686. Reliability is at its best when the showup occurs within 2 hours after the crime and the accused is not displayed suggestively. National Research Council of the National Academies, *Identifying the Culprit: Assessing Eyewitness Identification*, 97 (2014) at 27-28. It is believed that "the benefit of a fresh memory outweighs the inherent suggestiveness of the procedure." *Lawson*, 291 P.3d at 686; Tim R. Robicheaux, *Presumed Innocent? The Social Science of Wrongful Conviction*, Lesson 7-1 (2014).

robbery” committed with the suggestion of a weapon. Resp.Br. 11-13, 21. His support is a study of the effect of suggestion on military personnel involved in realistic mock POW simulations. *Id.* at 12. See C.A. Morgan III, *et al.*, *Misinformation Can Influence Memory for Recently Experienced, Highly Stressful Events*, *Int’l J. L. & Psychiatry* 36 (2013). There is no doubt that two days of exposure to intensive physical, psychological, and emotional abuse and deprivation at the hands of multiple “interrogators” under POW interrogation scenarios is a “high stress” situation which was clearly tied to the results of identification efforts attempted 48 hours after the abuse ended. See *Misinformation Can Influence Memory* (detailing the study and its results). By comparison, the claim that the relatively innocuous events of this robbery are sufficiently similar to such a “highly stressful event” as to render Oney’s identification susceptible to the suggestiveness of a showup thirty-five minutes after the robbery is entirely unpersuasive. Not only did this scenario lack all of the stress factors of the POW study, but it lacked the use of a weapon. Lujan claims that the “implied weapon” was “likely more distracting” for Oney than an actual weapon, but he offers no authority for the claim. Resp.Br. 11.

Moreover, he misdirects this Court as to Oney’s “original memory,” pointing to the last five seconds of their interaction. *Id.* at 11-21. Oney’s

“original memory,” however, was the first “10 seconds” or “longer” the two spent face-to-face in the car door before any weapon was suggested. R357:39-41. This circumstance has absolutely no correlation with the POW study, lacking both high stress and a weapon, implied or otherwise. It was not until after this initial exposure that a weapon was implied and the stress level rose, although it still fell far short of the stress involved in the POW study.

As Lujan provides no evidence demonstrating that a showup has any adverse effects when the original memory is of a moderately stressful, nonviolent event, there is no reason to believe Oney’s original memory did not form the basis for the showup identification. *See, e.g., Lawson*, 291 P.3d at 699-700 (showup conducted 5 hours after robbery did not contribute to witness’ identification of perpetrator despite possibility of stress from attempt by perpetrator to punch eyewitness which arose only after eyewitness was face-to-face with perpetrator and had clear opportunity to view him).⁵

⁵Lujan’s assertion that “fatigue was likely a factor” affecting Oney’s identification (Resp.Br. 13-14) lacks record support where the trial court ruled out any such concern. R356:74-76;R357:15-18. Equally telling is that there were no other injuries, drugs, alcohol or other indicators of any physical, emotional, or mental impairment on Oney’s part.

Additionally, Lujan's focus on the last few seconds of the robbery ignores a number of favorable memory factors which arose in the first half of the pair's contact and which contribute to a high degree of accuracy in Oney's later identifications: time spent observing the robber, illumination, physical distance, direction of gaze, distractions, and type or amount of attention given by the witness. First, as a general rule, the more time spent observing the robber's face during a crime, the greater the accuracy in a later identification. National Research Council of the National Academies, *Identifying the Culprit: Assessing Eyewitness Identification*, 97 (2014). This includes increases of mere seconds. See, e.g., Andreas Kapardis (2009), *Psychology and Law: A Critical Introduction*, 43-44 (*Considerations for Eyewitness Testimony*) (referencing study finding "significantly more accurate recall" when exposure increased by 15 seconds). Also, the better the illumination, the greater the accuracy, especially where the illumination is on the same angle as the offender. Stephen J. Ross, Colin G. Tredoux, & Roy S. Malpass, (2015) *Evaluating Eyewitness Testimony of Adults* 513, 527. In I. B. Weiner & R. K. Otto (Eds.), *The Handbook of Forensic Psychology* (4th ed.). Boston, MA: Credo Reference. Even a slight lengthening of viewing time with good illumination will improve the visual information obtained by an observer. *Identifying the Culprit* at 50-51. And more important than time of

exposure is the type or amount of attention given by the witness. Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 Ann. Rev. Psychol. 227, 282 (2003). If a witness has a reason to pay close attention, the accuracy of the identification increases. *Id.*

Second, the physical distance between the two is an important estimator variable, directly affecting the eyewitness' ability to discern visual details, like the offender's features. *Id.* at 92. Distance is inversely proportional to the accuracy of the later identification, especially where the offender was previously unknown. Ross *et al.* at 527. In other words, the closer the two individuals, the more accurate the identification. *Id.*

Third, the direction of the observer's gaze affects identification accuracy, with visual acuity being at its best "at the observer's center of gaze." *Identifying the Culprit* at 51, 56. "The center is the part of your visual system that is used for fine sensing, such as" "scrutinizing faces in a social context." *Id.* Both the "quality and quantity of information sensed a mere 10 degrees from center are far less than what is available at the center of gaze." *Id.*; see also *id.* at 52-53 (matters on the periphery—not within the center of gaze—do "not reach awareness" or are "not perceived" as accurately). And viewing a face from an angle can distort facial features. *Id.* at 56. Hence, accuracy increases when the witness' center of gaze and the

offender are at the same level. Moreover, research suggests that an emotional response narrows attention at the expense of peripheral details. Wells & Olson, *Eyewitness Testimony* at 282; see also Gary L. Wells, Amina Memon, & Steve D. Penrod, *Eyewitness Evidence: Improving Its Probative Value*, 7 Psychol. Sci. in the Publ. Int. 45, 54 (2006). And the ability to process is increased with fewer objects competing for attention or more distance between the objects. *Identifying the Culprit* at 54. For example, when a crime occurs in a “visually complex scene” like a sporting event, the ability “to accurately perceive the facial features of a perpetrator” may be lessened. *Id.*

Lujan summarily dismisses the first ten seconds of his contact with Oney. He notes only that the two were 8 to 9 inches apart for 5 to 7 seconds, Oney was startled and would have had little reason to pay attention, and the event occurred in poor witnessing conditions.⁶ Resp.Br. 10-12,16,20. Proper application of the above factors to the first ten seconds of contact, however, points strongly to a high degree of accuracy in Oney’s independent memory of Lujan as the robber and, hence, a very low degree

⁶These and many other of Lujan’s factual references differ from those made by the State. The difference may be explained by Lujan’s primary reliance on and citation to the preliminary hearing testimony while the State relies on the trial evidence.

of suggestibility from the one-man showup, just as Oney testified. R357:49-50,94,95,106-07 (Oney's explanation that he based his showup identification on Lujan's looks).

According to Oney, the two were face-to-face about ten inches apart for "a good 10 seconds" or "longer." R357:39-40. As Lujan was a stranger, the minimal distance suggests a significant increase in the accuracy of Oney's identification of Lujan 30 minutes later. Ross, *et al.* at 527. There were no distortions attributable to differing heights or angles as the two were face-to-face. Matters on the periphery—such as hair and clothing—were not in Oney's "center of gaze" where his visual acuity was at its best, and were, therefore, likely processed less accurately, accounting, in part, for the discrepancies as to those factors. There was no evidence of any distractions—noise, people, or movements—and there was nothing "visually complex" about the scene.

Lujan calls Oney's initial exposure to Lujan "startling" and suggests that Oney had "little reason" to pay close attention. Resp.Br. 11-12. However, the unexpected appearance of an unknown trespasser in Oney's personal space at a time and place where no one would have been expected prompted Oney to afford Lujan his undivided attention and gave Oney a significant opportunity to view Lujan from the most advantageous

perspective. The stress level was neither very high nor very low at that point, and Oney was not only emotionally committed to the situation but exclusively focused on the man in front of him—looking to the stranger to enlighten him about his presence—and thereby adding to the accuracy of his later identification. See Wells & Olson, *Eyewitness Testimony* at 282 (discussing widely-accepted Yerkes-Dodson Law which provides that only very high and very low levels of stress or arousal impair memory).

2. Weapon focus.

Lujan contends the accuracy of Oney's identification would be adversely affected by his focus on what he believed was a weapon in the robber's waistband. Resp.Br. 10-11,13. But the robber never brandished a weapon that would cause a distraction. Weapon focus describes a situation in which the observer's "attention is compellingly drawn to emotionally laden stimuli, such as a gun or a knife, at the expense of acquiring greater visual information about the face of the perpetrator." *Identifying the Culprit* at 55. Research on its effects on eyewitness identifications is inconclusive and the effects are inconsistent. *Id.* at 93; Wells *et al.*, *Eyewitness Evidence* at 53. At least one analysis determined that the presence of a weapon had a "larger effect" on accuracy in threatening scenarios than in non-threatening ones. *Id.* Moreover, the adverse effects are believed to appear only in very

high or very low stress situations. *Id.* at 94-95; Wells & Olson, *Eyewitness Testimony* at 282.

By these standards, any impairment from weapon-focus in this case would be minimal, if existent at all. No weapon was brandished. The robbery involved a non-threatening scenario where the only weapon threat was implied and was unaccompanied by a verbal threat. Despite the implied threat, Oney's focus was not solely on Lujan's waistband but broadly encompassed "the whole person" as he shifted back and forth between Lujan's face and his arm. R357:36-37; *see* R357:56-59 (Oney's focus included robber's height, which Lujan matched). Even if Oney gained no further visual information about Lujan's face once a weapon was implied, he had already spent several long seconds focusing directly on Lujan's well-lit, undisguised face in unexpected but non-threatening circumstances with no suggestion of a weapon, providing ample basis for his later identification.

3. Own-race bias.

Lujan claims that the mere fact that Oney and the robber were of different races commands exclusion of the identification evidence, citing to the "stunning and robust" evidence on this point. Resp.Br. 19-20.

That “robust” evidence, however, is anything but conclusive. Own-race or other-race bias is the phenomenon where faces of people of races different than an eyewitness’ are harder to accurately identify than are faces of people of the same race. *Identifying the Culprit* at 96; Kareem J. Johnson & Barbara L. Fredrickson, *We All Look the Same to Me*, 2005 Psychol Sci, Nov. 16(11). Own-race bias does not mean cross-racial identification is necessarily wrong or erroneous; it simply increases the risk of error. Andrew E. Taslitz, “Curing” Own Race Bias: What Cognitive Science and the Henderson Case Teach About Improving Jurors’ Ability to Identify Race-Tainted Eyewitness Error, 16 Legislation and Public Policy, 1049, 1053. While it occurs across a range of races, ethnicities and ages (*Identifying the Culprit* at 96), studies have determined that “the risk of misidentification is greatest where the victim is white and the defendant is African American.” Harvey Gee, *Book Review: Eyewitness Testimony and Cross Racial Identification*, 35 New Eng. L. Rev. 835, 840 (2001). See also Taslitz, 16 Legislation and Public Policy at 1052-53 (evidence suggests bias “might be somewhat worse when whites are identifying persons of other races.”); Mark Rith, *Looking Across the Racial Divide: How Eyewitness Testimony can Cause Problems*, Pittsburgh Post-Gazette (12/26/10) (studies show that cross-race effect is “worse for people in a majority population group”); Johnson & Fredrickson, 2005 Psychol Sci,

Nov. 16(11) (own-race bias is “most pronounced for Caucasians viewing members of racial minority groups”) (citing “Meissner & Bringham, 2001”). This suggests that the effect is somewhat less where, as here, the witness and the perpetrator are neither white nor black.

The risk is less in a number of other circumstances relevant here: (1) when the observer is between the ages of 20 and fifty rather than at either end of the age spectrum (Ross *et al.* at 526; Wells & Olson, *Eyewitness Testimony* at 280); (2) when a quick verbal description of the face is given shortly after viewing it (Gary L. Wells & Elizabeth A. Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 Psychol., Pub. Pol’y, & L. 230, 232 (2001)); and (3) when the interval between the initial observation and the initial identification is shorter (*id.*; *Identifying the Culprit* at 96, 98-99).

Further, a number of studies have found that both the quantity and the quality of time spent around members of another race increase memory performance, with the contact showing a “small, yet significant effect” that has increased over the years. See Christian A. Meissner & John C. Bringham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 Psychol., Pub. Pol’y, & Law 3, 8, 21-22 (2001); see also Bryan S. Ryan, *Alleviating Own-Race Bias in Cross-Racial Identifications*, 8

Wash. U. Jur. Rev. 115, 127 & nn. 54, 57 (2015) (describing “interracial contact theory” as the “most widely accepted theory” concerning own-race bias); Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 Conn. L. Rev. 1, 35 (2000)(studies show that the own-race bias phenomenon is “particularly caused by a lack of familiarity with people from other ethnic groups”). Numerous studies show that living in integrated neighborhoods produced better recognition of “novel other-race faces” than living in segregated neighborhoods and that individuals with self-reported experience with other races demonstrated a better memory for other-race faces. *Thirty Years of Investigating*, 7 Psychol., Pub. Pol’y, & Law 8.

Based on these authorities, Oney’s lengthy exposure to and familiarity with the high density of Hispanics in his neighborhood (R357:43-44, 100-01), his age, the circumstances of his initial exposure to Lujan’s face, and the quick verbal description he provided shortly after the robbery, minimize the adverse impact of the cross-racial component of Oney’s identification.⁷

⁷The fact that Oney and both counsel used the terms “Spanish,” “Mexican” and “Hispanic” interchangeably does not undermine Oney’s description of the robber. Rspd.Br. 20. Regardless of the technicalities behind the terms, they are often used interchangeably in the United States. See Marcela Hede, *Hispanic v. Latino*, July 18, 2013; Hasa, *Difference Between Mexican and Hispanic*, October 12, 2015; Juan Arredondo, *Why You Should Give The Term “Hispanic” The Middle Finger*, October 26, 2016.

4. Certainty.

Lujan claims the circumstances of the showup falsely inflated Oney's certainty in his identification. Resp.Br. 17-19. He argues that a suggestive showup will inflate the certainty of an eyewitness' identification and alter the eyewitness' memory to support the inflated level of certainty. *Id.* Research suggests that the witness can become more certain in his identification over time, resulting in a weak relationship between eyewitness confidence and accuracy at trial. See John T. Wixted, *et al.*, *The Reliability of Eyewitness Confidence: Initial Eyewitness Confidence Reliably Predicts Eyewitness Identification Accuracy*, *American Psychologist*, 70, 515 (2015). This case did not follow that pattern, however. Four months after the showup, Oney identified Lujan as one of two familiar faces in a lineup, demonstrating a decrease in his certainty level. Clearly, no alteration of memory occurred, suggesting the showup was not as suggestive as Lujan would have this Court believe.

Moreover, there is increasing authority for the belief that a strong relationship exists between initial confidence levels and accuracy in an eyewitness identification. See *id.* Wixted explains that post 1996 studies indicate that first time identifications made with high confidence are associated with high accuracy—typically 80% correct or higher. *Id.* at 518.

So while confidence at the time of trial is not a reliable predictor of accuracy, a witness' confidence at the initial identification may well indicate greater accuracy. *Id.* at 524 (citing National Research Council, 2014, p. 74).

The question is whether Oney's confidence in his identification at the showup was the result of the setting or of his personal memory from his earlier exposure to the robber. The totality of the circumstances suggests the latter. In addition to the favorable witnessing conditions of Oney's initial exposure to Lujan, the minimal passage of time before the initial identification, and the absence of anything except "normal agitation" affecting Oney's mental capacity or state of mind, Oney testified that he identified Lujan at the showup because of his looks. R357:49-50,94-95,105-07. Lujan seeks to minimize, if not eliminate, consideration of this testimony, but he cites to no other case in which such testimony was given, let alone rejected as incredible. Resp.Br. 17,n.1.

Oney explained that his memory the night of the robbery was better than it was months later at the lineup and said that he identified Lujan at the showup because "[e]verything compares." R357:49-50,94-95,105-07. In other words, the jacket, the beanie, and the other visual cues provided by the suspect himself compared favorably with Oney's fresh memory and prompted Oney's initial identification. He did not mention the spotlights,

handcuffs, and other factors comprising the setting for the showup. *See id.* His assessment of Lujan's looks was corroborated by Officer Bias, who testified that Lujan matched the initial description of the car thief "very well." R357:136-37,141-42;R359:18. And Oney's confidence in that identification reinforces his reliability and weighs heavily against the suggestiveness of the initial showup. *See generally* Wixted, *et al.*, *American Psychologist* 70, 515-26.

Confidence was eliminated by this Court as a separate factor in evaluating the reliability of eyewitness identification. *State v. Long*, 721 P.2d 483, 490 (Utah 1986). But this Court later recognized that it may make it slightly more likely that an identification was reliable. *State v. Guzman*, 2006 UT 12, ¶22. Given the most recent research establishing a strong positive relationship between initial identification and confidence, Oney's positive affirmation of the basis for his identification, and the factors presented in the State's opening brief weighing against the suggestiveness of the police identification procedure in this case, this Court should find that under the totality of the circumstances, Oney's identification of Lujan was based on his personal memory and, hence, was sufficiently reliable, to be presented to the jury despite the showup setting. *See* Pet.Br. 29-49 (Arguments IC-D).

5. Oney's verbal description.

Finally, the accuracy of Oney's initial description of the robber must be considered in light of the circumstances under which it was given.

Lujan claims the record does not show that the initial investigation was rushed. Resp.Br. 15-16. However, while the police responded within minutes of the robbery, Oney's discussion with Officer Bias about both the robbery details and the suspect's description lasted only "a matter of seconds" during which the officer tried to get a "general brief description of the suspect." R357:118-20;R359:30-31. Despite the officer's intent to "ask more in-depth questions," he was distracted by his discovery of a "fresh trail of liquid." *Id.* Believing that "time was of the essence in tracking this wet trail of liquid to find the vehicle and possibly the suspect," Officer Bias "ended [his] investigation with Mr. Oney with the intent of completing that investigation...later in time." *Id.*

The rushed description may reasonably account for the absence of a mention of the robber's goatee. The discrepancy may also be explained by the circumstances of the interaction between the two men. While the overhead and side lighting in the car were sufficient to allow Oney to see the robber's face against the darkness outside the car, they may have been insufficient to permit him to see the delineation of his "scraggly" salt and

pepper facial hair. *See* R.358:56 (defense expert explaining close proximity may obscure some things); Ross *et al.* at 527 (lighting matching angle of observation leads to more accurate identification).

Similarly, research suggests the hair discrepancy may be explained because it constitutes visual information on the periphery and not at the observer's "center of gaze" and, hence, may not have been fully perceived by the observer. *Identifying the Culprit* at 52-53. This gives credence to the prosecutor's argument that Oney may have mistaken the black collar of the jacket for hair extending from under the black beanie. R362:13.

* * * * *

In sum, the reliability of eyewitness identification can depend on a large number of interdependent factors. A number of the circumstances surrounding the identification in this case suggest increased accuracy—or at least no decrease in accuracy—and, taken together, demonstrate that whatever suggestiveness attached to the showup, Oney's identification of Lujan was sufficiently likely to have been based on his original observations and memory so as to render the identification constitutionally admissible at trial. In the end, the reliability of Oney's identification properly rests with the jury, not the court.

III

A FINDING OF STATE ACTION AND A SUBSTANTIAL LIKELIHOOD OF IRREPARABLE SUGGESTIVENESS TRIGGERS A HEIGHTENED STANDARD OF REVIEW; THE COURT OF APPEALS MAJORITY ERRONEOUSLY FOUND REVERSIBLE ERROR UNDER THAT STANDARD

The State maintains the position stated in its opening brief: Oney's identification was constitutionally admissible and no further review is warranted. Aplt.Br. 48-52. However, even under the heightened federal standard, any error in admitting Oney's identifications was harmless beyond a reasonable doubt. *See State v. Calliham*, 2002 UT 86, ¶45 ("Where the error results in the deprivation of a constitutional right, we apply a higher standard of scrutiny, reversing the conviction unless we find the error harmless beyond a reasonable doubt").

Lujan mischaracterizes the State's case in the absence of the challenged identification testimony. Like the court of appeals, Lujan argues that without the testimony, the State "loses its strongest evidence" and it's case "is severely weakened." Resp.Br. 37,39. In fact, both Lujan and the court of appeals fail to recognize that exclusion of the challenged identification testimony would have altered the significance and weight afforded other evidence, providing additional support for Lujan's conviction: specifically, that the sole remaining identification would gain

elevated significance and lend added credibility to the victim and to the State's case.

Lujan challenged only the admission of his in-court and showup identifications. *See* Resp.Br. 37,39. *See also Lujan*, 2015 UT App 199, ¶9; Aplt.Br. 7, n.2 (acknowledging and excusing trial counsel's failure to challenge admission of lineup identification).⁸ Thus, for purposes of a harmlessness analysis, this Court must presume that the jury would have heard the lineup identification. The jury would have been told that four months after the robbery, Oney identified two suspects from an eight-man lineup, one of whom was the only person actually located within minutes of the early-morning robbery a short distance from the stolen car in clothes matching the victim's description and uttering words strikingly similar to the few words the robber had uttered to the victim. From a juror perspective, then, the only identification testimony presented would have been entirely accurate, thereby bolstering Oney's credibility. Thus, omission of the challenged identification evidence reasonably would have strengthened the State's case.

⁸Lujan excused the absence of a challenge the lineup identification as a matter of trial strategy. Aplt.Br. 7, n.2. The more likely reason is the fact that the lineup was held at defense counsel's insistence over the State's objection. R18-27,30-35. A challenge might have been seen as invited error.

Moreover, concern about the discrepancies in Oney's initial description of the robber would have been tempered by three facts: (1) Oney provided a description of both the suspect and the robbery details within only "a matter of seconds" (R357:118-19;R359:30); (2) studies establish the difficulties in accurately processing peripheral information outside the "center of gaze"; and (3) Oney later successfully identified a man who was, in fact, found near the stolen car the morning of the robbery and who largely matched the hurried verbal description.

Lujan's limited and self-serving view of the evidence omits much of the evidence beneficial to the State. Resp.Br. 37-39. First, he mistakenly declares that there is no support for the reasonable inference that he was the only individual the officers found the morning of the robbery. *Id.* at 39. Officer Bias explained that he typically worked the graveyard shift in that area and that no specific foot traffic stood out in his mind on that morning. R359:5-6. He also explained that he responded to Oney's call within minutes of the robbery and moved extremely quickly to find a suspect, believing that after he found the liquid trail left by the stolen car, "time was of the essence." R359:30-31. In his experience, a suspect will ditch a stolen car, run a few hundred yards, and hide. R357:24. Given the likelihood that the suspect was still near the car, the officer quickly called for additional

police units to establish a containment area using a large, intentionally-visible police presence in hopes of catching a suspect. R357:22-24. They not only located a single suspect, but Officer Bias described him as meeting Oney's description "very well," including his height, weight, build, ethnicity, hat, and jacket. R357:137;R359:11,18-19. Under these circumstances, the fact that only Lujan was found is significant.

Second, Lujan predicts that absent the challenged evidence, the State's case and the credibility of the State's officers would be undermined by testimony from a defense witness that he never heard of clothing being misplaced at the jail during the time he worked there. Resp.Br. 37. The jury rejected that testimony below, and there is no reason to believe that the absence of the challenged evidence would alter that fact.

A county jail clothing officer ["officer #1"] testified that, during intake, a coat and hat would be listed on a clothing inventory sheet and that he did not remember anything being misplaced in his three years on the job. *Id.* at 37;R359:64-65,69,72,75. But this officer only testified about the general inventory process and did not claim to have worked on Lujan's intake. *See* R359:61-75.

The officer who transported Lujan explained that Lujan wore both a black beanie and a black jacket when he was arrested and when he arrived

at the jail. R359:46-48. Neither item was listed on Lujan's inventory sheet, and Detective Davis, who picked up Lujan's clothing from booking the next day, explained that he received neither item. R359:50-52. When he returned to the jail to look for them, he was given the hat, despite its absence from the inventory sheet. *Id.* He asked for the jacket but was told they could not find it. R359:52-53. The stipulated testimony of the clothing officer who looked for the missing items and found only the hat confirms Davis' testimony. R359:101-02. These case-specific facts suggest that the testimony of officer #1 was inaccurate as to this case. Thus, instead of damaging the State's case, these facts and the testimony of Oney and two officers who remember that Lujan wore a black jacket when arrested are persuasive evidence that the black jacket existed, and permit the reasonable inference that the jacket was subsequently misplaced. R357:141-42;R359:46-47,58,95-96.

Third, Lujan echoes the court of appeals' view that the State's case would suffer from evidence that the K9 led officers to portable classrooms, not to Lujan. Resp.Br. 38-39. *See Lujan*, 2015 UT App 199, ¶18. The evidence and its reasonable inferences showed that the dog followed Lujan's scent from the abandoned car and led the officers in the direction in which Lujan was ultimately found, stopping en route at the classrooms only because it

was unsafe to continue through the potentially dangerous expanse without doing a sweep in case of an ambush.

The dog identified a scent at the abandoned car, pulled hard on its leash, and unerringly followed the scent across the schoolyard, all indicating that he had “picked up on a track of the person that they [were] looking for.” R357:128. There was no hesitation or other tell-tale sign of confusion suggesting multiple scents or multiple trails.

The path crossed the classrooms before reaching Lujan. Because the suspect could use the classrooms to ambush officers, and the handler could not manage the dog and use his weapon together, progress slowed to allow a safety sweep of the area. R357:128-29;R359:17,26-27. The precaution does not show that the dog was not following Lujan’s path, that it intentionally diverted from that path, or that any officers had already veered off only to later find Lujan independent of the traced scent. It shows only that the officers took control of their advancement for their own safety. R359:26-28.

Once Officer Bias heard a noise, he alone left the others to complete their safety sweep, even though he recognized that, for safety purposes, it “was probably poor tactics” to do so. R359:27-28. Following the noise led the officer to the HVAC units, which were along the same line of sight from the car as the classrooms. *Id.* There was no evidence that the dog sought to

follow the scent in any other direction. In fact, the dog's conduct upon arriving at the scene—barking and focused on Lujan to the point of scaring him—suggests that Lujan's was the scent he had been following. R357:132-33;R359:18. Properly viewed, this evidence suggests that the jury is likely to find that Lujan's discovery at the end of the path decisively taken by the police dog from the stolen car is a significant factor in favor of conviction. R359:27.

Finally, Lujan ignores his own conduct which contributed to his conviction. The morning of the robbery, he claimed to have called 911 to get police to come help him. R359:22-23. But when found, he simply stared at the uniformed officers when they repeatedly ordered him to come out. R357:132-34. He also produced two cell phones which showed a single 911 call made in 2004. R359:53-56. Further, he revealed a verbal link with the robber upon discovery: he stated, "[S]omebody is following me"—the very concern the car thief expressed in Oney's driveway—"Why you following me? Why you following me?" R357:18,77;R359:8,22.

In sum, absent the challenged identification evidence, the evidence still established that at 4 o'clock on a November morning shortly after a car robbery in a residential area to which Lujan had no connection, the police found a man matching Oney's verbal description of the robber "very well,"

who was of the same ethnicity, height, and weight, who wore a black beanie and a black jacket as described by the victim, and who was in fact later identified by the victim as one of two potential suspects at a photo lineup. He was found within minutes of the robbery, on the opposite side of a schoolyard adjacent to the stolen car, and at the end of the path decisively taken by the trained K9 directly from the stolen car. When discovered, his conduct and his cell phones contradicted his claim that he requested police help, and he uttered to an officer a paraphrase of a statement made by the robber to the victim half an hour earlier.

This compelling evidence amply supports Lujan's conviction and demonstrates that any error in the admission of Oney's showup and in-court identifications of Lujan would be harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons and those stated in the State's opening brief, the Court should reverse the judgment of the Court of Appeals.

Respectfully submitted on November 16, 2016 .

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CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 6,962 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.

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CERTIFICATE OF SERVICE

I certify that on November 16, 2016, two copies of the Reply Brief of
Petitioner were ☐ mailed ☒ hand-delivered to:

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Also, in accordance with Utah Supreme Court Standing Order No. 8,
a courtesy brief on CD in searchable portable document format (pdf):

☒ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.

Addendum A

Cited Authorities – Web Access:

Andreas Kapardis (2009), *Psychology and Law: A Critical Introduction* 43-44 (*Considerations for Eyewitness Testimony*)
(<https://www.boundless.com/psychology/textbooks/boundless-psychology-textbook/memory-8/memory-distortions-58/considerations-for-eyewitness-testimonyh-225-12760/>)

Andrew E. Taslitz, "Curing" Own Race Bias: What Cognitive Science and the Henderson Case Teach About Improving Jurors' Ability to Identify Race-Tainted Eyewitness Error, 16 *Legislation and Public Policy*, 1049
(http://racism.org/index.php?option=com_content&view=article&id=1746:race-tainted-eyewitness&catid=136&Itemid=155)

Bryan S. Ryan, *Alleviating Own-Race Bias in Cross-Racial Identifications*, 8 *Wash. U. Jur. Rev.* 115, 127 & nn. 54, 57 (2015)
(http://openscholarship.wustl.edu/law_jurisprudence/vol8/iss1/5)

C.A. Morgan III, et al., *Misinformation Can Influence Memory for Recently Experienced, Highly Stressful Events*, *Int'l J. L. & Psychiatry* 36 (2013)
(<http://dx.doi.org/10.1016/j.ijlp.2012.11.002>)

Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 *Psychol., Pub. Pol'y, & Law* 3, 8, 21-22 (2001)
(http://digitalcommons.utep.edu/cgi/viewcontent.cgi?article=1004&context=christian_meissner)

Gary L. Wells, Amina Memon, & Steve D. Penrod, *Eyewitness Evidence: Improving Its Probative Value*, 7 *Psychol. Sci. in the Publ. Int.* 45 (2006)
(https://www.psychologicalscience.org/journals/pspi/pspi_7_2_article.pdf)

Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 *Ann. Rev. Psychol.* 227 (2003)
(https://public.psych.iastate.edu/glwells/annual_review_2003.pdf)

Gary L. Wells & Elizabeth A. Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 *Psychol., Pub. Pol'y, & L.* 230, 232 (2001)
(<http://dx.doi.org/10.1037/1076-8971.7.1.230>)

Harvey Gee, *Book Review: Eyewitness Testimony and Cross Racial Identification*, 35 New Eng. L. Rev. 835, 840 (2001)
(http://heinonline.org/HOL/Page?handle=hein.journals/newlr35&div=48&g_se nt=1&collection=journals)

Hasa, *Difference Between Mexican and Hispanic*, October 12, 2015;
(<http://pediaa.com/difference-between-mexican-and-hispanic/>)

Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 Conn. L. Rev. 1, 35 (2000)
(<https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&d octype=cite&docid=33+Conn.+L.+Rev.+1&srctype=smi&srcid=3B15&key=2be 8cb3a05423718f1239e6870261bcd>)

Juan Arredondo, *Why You Should Give The Term "Hispanic" The Middle Finger*, October 26, 2016
(<http://www.vibe.com/2016/10/hispanic-versus-latino-opinion/>)

Kareem J. Johnson & Barbara L. Fredrickson, *We All Look the Same to Me*, 2005 Psychol Sci, Nov. 16(11)
(<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1808554/>)

Marcela Hede, *Hispanic v. Latino*, July 18, 2013
(<http://hispanic-culture-online.com/hispanic-vs-latino.html>)

Mark Rith, *Looking Across the Racial Divide: How Eyewitness Testimony can Cause Problems*, Pittsburgh Post-Gazette (12/26/10)
(<http://www.post-gazette.com/news/science/2010/12/26/Looking-across-the-racial-divide-How-eyewitness-testimony-can-cause-problems/stories/201012260195>)

National Research Council of the National Academies, *Identifying the Culprit: Assessing Eyewitness Identification* (2014)
(<http://nap.edu/18891>)

Stephen J. Ross, Colin G. Tredoux, & Roy S. Malpass, *Evaluating Eyewitness Testimony of Adults*. In I. B. Weiner & R. K. Otto (Eds.), *The Handbook of Forensic Psychology* (4th ed.). Boston, MA: Credo Reference.

(<http://faculty.washington.edu/sjross2/documents/Ross&13%20-%20evaluating%20eyewitness%20testimony%20of%20adults.pdf>)

Tim R. Robicheaux, *Presumed Innocent? The Social Science of Wrongful Conviction*, Lesson 7-1 (2014)

(https://class.coursera.org/wrongfulconviction-001/wiki/view?page=Lesson_7-2)

Wixted, John T., et al., *The Reliability of Eyewitness Confidence: Initial Eyewitness Confidence Reliably Predicts Eyewitness Identification Accuracy*, *American Psychologist* 70, 515 (2015)

(http://wixtedlab.ucsd.edu/publications/wixted2015/American_Psychologist_in_press.pdf)